



Via Electronic Submission:

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May 31, 2011

Federal Trade Commission
Office of the Secretary, Room H-113 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580.

RE: Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program, Matter V100017

Scott & White Healthcare (SWH) appreciates the opportunity to provide comments on Matter V100017, the Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program ("Policy"). Although the Policy presents numerous issues important to potential ACOs, the policy does not provide any substantial guidance or greater flexibility as to what activities ACO participants may engage. We look forward to working with the FTC and others to shape a program that provides high value healthcare for beneficiaries.

SWH currently provides the continuum of care under the same corporate umbrella. SWH is a Central Texas-based, non-profit health care system with 12 hospitals owned, partnered with or managed, more than 60 clinics and a 240,000+ member health plan; it is recognized as one of the nation's largest multi-specialty group practice systems. Founded in 1897, SWH has more than 13,000 employees, over 900 physicians and scientists, and two million outpatient visits in 2010. The SWH service area currently covers over 29,000 square miles. A clinical partner for Texas A&M Health Science Center College of Medicine, SWH has 32 accredited residency and fellowship programs with 406 medical residents and fellows in training. SWH also has more than 40,000 sq ft of bench research space and has increased NIH funding fivefold since 2000. Lastly, SWH owns a non-profit pharmacy benefit manager and 14 pharmacies as well.

The following comments address various topics presented in Matter V100017.

1. The Policy recognizes that ACOs will want to participate in both the Medicare and commercial markets. The Policy proposes that if the ACO has been approved to participate in the Medicare program, the FTC will extend the "rule of reason" treatment to

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the ACO's activities in the commercial market (if the ACO uses the same governance and leadership structure, and the same clinical administrative processes it uses to qualify and participate in the Program). There are two concerns regarding this proposal: (a) It appears that Program approval of the ACO must be obtained before the FTC will grant any leniency in reviewing the ACO's commercial activities. Accordingly, commercial only ACOs do not qualify for any rule of reason or safe harbor treatment. (b) The "rule of reason" provides no guidance as to what activities the ACO participants might engage. It merely allows the FTC, on a case-by-case basis, to balance harm to competition against pro-competitive benefits to consumer.

2. For a qualifying ACO to fall within the "safety zone," independent ACO participants must have a combined share of 30% or less of each common service in each participant's primary services area where two or more ACO participants provide that service to patients. This threshold is set too low. The healthcare providers who are best positioned to form ACOs and provide the desired efficiencies and reductions in cost are the larger healthcare providers. By creating a safety zone that requires combined market share equal to 30% or less, the FTC is impeding the ability of the most qualified providers to participate in ACOs.

3. The FTC creates a "maybe, maybe not" category for ACOs whose independent participants have a combined share of 30% - 50% in a primary service area. It would be better to just increase the safety zone criteria to 50% rather than create this zone of ambivalence.

4. Mandatory pre-review by the FTC is required for ACOs whose independent participants have a combined share of 50% or more in any primary service area. Many potential participants will opt to not participate in ACOs if they have to seek mandatory review by the FTC.


5. The Proposed Statement identifies five types of conduct that an ACO can avoid to reduce the likelihood of an antitrust investigation. Of the five types of conduct identified, all but one are integral to creating the kinds of efficiencies and/or cost reductions that the ACOs are envisioned to achieve.

6. Unfortunately, the Proposed Statement does not provide any substantial guidance or greater flexibility with respect to what activities ACO participants may engage. In order for an ACO to achieve reduced costs in the delivery of high-quality healthcare, it would be extremely beneficial for the ACO participants to share information regarding what they each pay to vendors for supplies/equipment, compensation information for their respective employees, payor data, etc. This is information that is typically not permissible to share from an anti-trust perspective. Under the Policy, such information could

presumably be shared only if the combined market share in any primary service area is 30% or less. That means the players who could really make a difference will not be incentivized to participate.

Thank you for your consideration of these comments.

Sincerely, 

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